

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

SERGIO SANCHEZ,  
CDCR #J-07661,

Plaintiff,

vs.

AMY MILLER, Warden; R. MADDEN,  
Chief Deputy Warden; M. GREENWOOD,  
Captain; N. TELLES, Correctional  
Lieutenant; O. MARTIN, Correctional  
Officer; DOES 1-5, Correctional Officers,

Defendants.

Civil No. 14cv2407 LAB (MDD)

**ORDER:**

**(1) GRANTING MOTION  
TO PROCEED *IN FORMA*  
*PAUPERIS*  
(Doc. No. 2)**

**(2) DENYING MOTION TO  
APPOINT COUNSEL  
(Doc. No. 3)**

**AND**

**(3) DIRECTING U.S.  
MARSHAL TO EFFECT  
SERVICE OF SUMMONS  
AND COMPLAINT PURSUANT  
TO FED.R.CIV.P. 4(c)(3)  
AND 28 U.S.C. § 1915(d)**

Sergio Sanchez (“Plaintiff”), a state prisoner currently incarcerated at Centinela State Prison (“CEN”) in Imperial, California, has filed a civil rights Complaint (“Compl.”) pursuant to 42 U.S.C. § 1983 (Doc. No. 1).

Plaintiff claims several CEN officials violated his First, Eighth, and Fourteenth Amendment rights by filing disciplinary charges against him because he refused medical treatment on September 27, 2013. *See* Compl. at 3-5, ¶¶ 9-26. Plaintiff seeks

1 declaratory relief, as well as compensatory and punitive damages, and he alleges to have  
 2 exhausted “all available administrative remedies” before filing suit. *Id.* at 5-7, ¶¶ 27, 32-  
 3 34.

4 Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a);  
 5 instead, he has filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28  
 6 U.S.C. § 1915(a) (Doc. No. 2), along with a Motion to Appoint Counsel (Doc. No. 3).

## 7 I.

### 8 Motion to Proceed IFP

9 All parties instituting any civil action, suit or proceeding in a district court of the  
 10 United States, except an application for writ of habeas corpus, must pay a filing fee. *See*  
 11 28 U.S.C. § 1914(a).<sup>1</sup> An action may proceed despite the plaintiff’s failure to prepay the  
 12 entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See*  
 13 *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted  
 14 leave to proceed IFP remains obligated to pay the entire fee in “increments,” *see*  
 15 *Williams v. Paramo*, \_\_ F.3d \_\_, 2015 WL 74144 at \*1 (9th Cir. 2015), regardless of  
 16 whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v.*  
 17 *Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

18 Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act  
 19 (“PLRA”), a prisoner seeking leave to proceed IFP must also submit a “certified copy  
 20 of the trust fund account statement (or institutional equivalent) for ... the six-month  
 21 period immediately preceding the filing of the complaint.” 28 U.S.C. § 1915(a)(2);  
 22 *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account  
 23 statement, the Court must assess an initial payment of 20% of (a) the average monthly  
 24 deposits in the account for the past six months, or (b) the average monthly balance in the  
 25 account for the past six months, whichever is greater, unless the prisoner has no assets.

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26  
 27 <sup>1</sup> In addition to the \$350 statutory fee, all parties filing civil actions on or after  
 28 May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a),  
 (b); Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule (eff. May  
 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is  
 granted leave to proceed IFP. *Id.*

1 *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of  
 2 the prisoner must collect subsequent payments, assessed at 20% of the preceding  
 3 month's income, in any month in which his account exceeds \$10, and forward them to  
 4 the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

5 In support of his IFP Motion, Plaintiff has submitted a certified copy of his trust  
 6 account statement pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2.  
 7 *Andrews*, 398 F.3d at 1119. The Court has reviewed Plaintiff's trust account statement  
 8 and has determined that Plaintiff has had no deposits to his account, and no available  
 9 funds from which to pay any filing fees at this time. *See* 28 U.S.C. § 1915(b)(4)  
 10 (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action  
 11 or appealing a civil action or criminal judgment for the reason that the prisoner has no  
 12 assets and no means by which to pay the initial partial filing fee."); *Taylor*, 281 F.3d at  
 13 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve" preventing dismissal  
 14 of a prisoner's IFP case based solely on a "failure to pay . . . due to the lack of funds  
 15 available to him when payment is ordered.").

16 Therefore, the Court GRANTS Plaintiff's Motion to Proceed IFP (Doc. No. 2) and  
 17 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350  
 18 balance of the filing fees due must be collected and forwarded to the Clerk of the Court  
 19 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

## 20 II.

### 21 Motion for Appointment of Counsel

22 Plaintiff also requests appointment of counsel on grounds that he is indigent,  
 23 incarcerated, has limited access to the law library and knowledge of the law, and because  
 24 a "trial in the case will likely involve conflicting testimony and counsel would better  
 25 enable [him] to present evidence and cross-examine witnesses." *See* Doc. No. 3 at 1.

26 Nonetheless, "[t]here is no constitutional right to appointed counsel in a § 1983  
 27 action." *Rand v. Rowland*, 113 F.3d 1520, 1525 (9th Cir. 1997) (citing *Storseth v.*  
 28 *Spellman*, 654 F.2d 1349, 1353 (9th Cir. 1981)); *see also Hedges v. Resolution Trust*

1 *Corp. (In re Hedges)*, 32 F.3d 1360, 1363 (9th Cir. 1994) (“[T]here is no absolute right  
 2 to counsel in civil proceedings.”) (citation omitted). Federal courts do not have the  
 3 authority “to make coercive appointments of counsel.” *Mallard v. United States District*  
 4 *Court*, 490 U.S. 296, 310 (1989); *see also United States v. \$292,888.04 in U.S.*  
 5 *Currency*, 54 F.3d 564, 569 (9th Cir. 1995).

6 Districts courts have discretion pursuant to 28 U.S.C. § 1915(e)(1), to “request”  
 7 that an attorney represent indigent civil litigants upon a showing of “exceptional  
 8 circumstances.” *See Agyeman v. Corrections Corp. of America*, 390 F.3d 1101, 1103  
 9 (9th Cir. 2004); *Rand*, 113 F.3d at 1525. However, a finding of exceptional  
 10 circumstances requires “an evaluation of the likelihood of the plaintiff’s success on the  
 11 merits and an evaluation of the plaintiff’s ability to articulate his claims ‘in light of the  
 12 complexity of the legal issues involved.’” *Agyeman*, 390 F.3d at 1103 (quoting *Wilborn*  
 13 *v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986)); *see also Terrell v. Brewer*, 935 F.2d  
 14 1015, 1017 (9th Cir. 1991).

15 The Court notes that any pro se litigant “would be better served with the assistance  
 16 of counsel.” *Rand*, 113 F.3d at 1525 (citing *Wilborn*, 789 F.2d at 1331). However, so  
 17 long as a person proceeding in pro se, like Plaintiff in this case, is able to “articulate his  
 18 claims against the relative complexity of the matter,” the “exceptional circumstances”  
 19 which might *require* the appointment of counsel do not exist. *Id.* (finding no abuse of  
 20 discretion under 28 U.S.C. § 1915(e) when district court denied appointment of counsel  
 21 despite fact that pro se prisoner “may well have fared better—particularly in the realms  
 22 of discovery and the securing of expert testimony.”).

23 As currently pleaded, Plaintiff’s Complaint demonstrates his ability to articulate  
 24 the essential facts supporting his claim. Thus, at least at this initial pleading stage, the  
 25 Court finds he appears to have an adequate grasp of the relevant facts as well as the  
 26 relatively straightforward legal issues involved. *See Terrell*, 935 F.2d at 1017. In fact,  
 27 as discussed below, the Court finds Plaintiff’s allegations are sufficient to survive the  
 28 initial screening required by 28 U.S.C. §§ 1915(e)(2) and 1915A. Because Plaintiff has

1 not satisfied the stringent standards required for an appointment of counsel under 28  
 2 U.S.C. § 1915(e)(1), however, his Motion for Appointment of Counsel (Doc. No. 3) must  
 3 be DENIED without prejudice at this time.

### 4 III.

#### 5 Sua Sponte Screening per 28 U.S.C. § 1915(e)(2) & § 1915A(b)

6 Notwithstanding IFP status or the payment of any partial filing fees, the PLRA  
 7 also obligates the Court to review complaints filed by all persons proceeding IFP and by  
 8 those, like Plaintiff, who are “incarcerated or detained in any facility [and] accused of,  
 9 sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or  
 10 conditions of parole, probation, pretrial release, or diversionary program,” “as soon as  
 11 practicable after docketing.” See 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these  
 12 provisions of the PLRA, the Court must sua sponte dismiss complaints, or any portions  
 13 thereof, which are frivolous, malicious, fail to state a claim, or which seek damages from  
 14 defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v.*  
 15 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Rhodes v.*  
 16 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing 28 U.S.C. § 1915A(b)).

17 “[W]hen determining whether a complaint states a claim, a court must accept as  
 18 true all allegations of material fact and must construe those facts in the light most  
 19 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); see also  
 20 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2)  
 21 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). However, while  
 22 a plaintiff’s allegations are taken as true, courts “are not required to indulge unwarranted  
 23 inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681 (9th Cir. 2009) (internal  
 24 quotation marks and citation omitted). Thus, while the court “ha[s] an obligation where  
 25 the petitioner is pro se, particularly in civil rights cases, to construe the pleadings  
 26 liberally and to afford the petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d  
 27 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir.

28 / / /

1 1985)), it may not “supply essential elements of claims that were not initially pled.” *Ivey*  
2 *v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

3 The Court finds that Plaintiff’s Complaint alleges constitutional claims sufficient  
4 to survive the sua sponte screening required by 28 U.S.C. § 1915(e)(2) and § 1915A(b).  
5 *See, e.g., Cruzan v. Dir., Mo. Dept. of Health*, 497 U.S. 261, 281 (1990) (“It cannot be  
6 disputed that the Due Process Clause protects an interest in life as well as an interest in  
7 refusing life-sustaining medical treatment.”); *Thor v. Superior Court*, 5 Cal. 4th 725, 732  
8 (Cal. 1993) (holding that “under California law a competent, informed adult has a  
9 fundamental right of self-determination to refuse or demand the withdrawal of medical  
10 treatment of any form irrespective of the personal consequences,” and that “in the  
11 absence of evidence demonstrating a threat to institutional security or public safety,  
12 prison officials, including medical personnel, have no affirmative duty to administer such  
13 treatment and may not deny a person incarcerated in state prison this freedom of  
14 choice.”); *Watison v. Carter*, 668 F.3d 1108, 1114-15 (9th Cir. 2012) (setting out  
15 elements of retaliation claim and finding plaintiff who alleged prison officials had “filed  
16 a false disciplinary complaint against him,” and “made false statements to the parole  
17 board” because he had exercised his constitutional right to petition for redress had  
18 “sufficiently pleaded First Amendment retaliation claims.”).

19 Based on these legal precedents and on the facts as currently alleged in Plaintiff’s  
20 Complaint, the Court will authorize U.S. Marshal service on his behalf. *See Lopez*, 203  
21 F.3d at 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve  
22 all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (providing that  
23 “service be effected by a United States marshal, deputy United States marshal, or other  
24 officer specially appointed by the court . . . when the plaintiff is authorized to proceed  
25 *in forma pauperis* pursuant to 28 U.S.C. § 1915.”).

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1 **IV.**

2 **Conclusion and Order**

3 Good cause appearing, IT IS HEREBY ORDERED that:

4 1. Plaintiff's Motion to Appoint Counsel (Doc. No. 3) is DENIED without  
5 prejudice.

6 2. Plaintiff's Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) (Doc. No.  
7 2) is GRANTED.

8 3. The Secretary of the California Department of Corrections and  
9 Rehabilitation, or his designee, is DIRECTED to collect from Plaintiff's prison trust  
10 account the \$350 filing fee owed in this case by collecting monthly payments from the  
11 account in an amount equal to twenty percent (20%) of the preceding month's income  
12 and forward payments to the Clerk of the Court each time the amount in the account  
13 exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS MUST BE  
14 CLEARLY IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS  
15 ACTION.

16 4. The Clerk of the Court is DIRECTED to serve a copy of this Order on  
17 Jeffrey A. Beard, Secretary, California Department of Corrections and Rehabilitation,  
18 P.O. Box 942883, Sacramento, California, 94283-0001.

19 IT IS FURTHER ORDERED that:

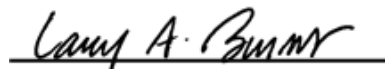
20 5. The Clerk will issue a summons upon Defendants, and forward it to Plaintiff  
21 along with a blank U.S. Marshal (USM) Form 285 for each named Defendant.<sup>2</sup> In

22  
23 <sup>2</sup> Plaintiff must, of course, identify the persons he currently lists only as Does 1-5  
24 whom he currently identifies only as "correctional officers" at CEN, by their true names  
25 and substitute those individual persons by amending his Complaint to identify each of  
26 these parties before the United States Marshal will be able to execute service upon any  
27 of them. *See* Compl. at 4; *Aviles v. Village of Bedford Park*, 160 F.R.D. 565, 567 (1995)  
28 (Doe defendants must be identified and served within 120 days of the commencement  
of the action against them); FED.R.CIV.P. 15(c)(1)(C) & 4(m). Generally, Doe pleading  
is disfavored. *Gillespie v. Civiletti*, 629 F.2d 637, 642 (9th Cir. 1980). And when the  
plaintiff proceeds IFP, it is in most instances impossible for the United States Marshal  
to serve a summons and complaint upon a party identified only as a Doe. *See Walker v.*  
*Sumner*, 14 F.3d 1415, 1422 (9th Cir. 1994) (in order to properly effect service under  
Rule 4 in an IFP case, the plaintiff is required to "furnish the information necessary to  
identify the defendant."). However, the Court will not dismiss Plaintiff's claims against

1 addition, the Clerk will provide Plaintiff with a copy of this Order, and a copy of his  
 2 Complaint and summons for purposes of serving each named Defendant. Upon receipt  
 3 of this "IFP Package," Plaintiff must complete the USM Form 285s as completely and  
 4 accurately as possible, and return them to the United States Marshal according to the  
 5 instructions provided by the Clerk in the letter accompanying his IFP package.  
 6 Thereafter, the U.S. Marshal is ORDERED to serve a copy of the Complaint and  
 7 summons upon Defendants as directed by Plaintiff on the USM Form 285s. All costs of  
 8 service will be advanced by the United States.

9       6. Plaintiff must thereafter serve upon Defendants or, if appearance has been  
 10 entered by counsel, upon Defendants' counsel, a copy of every further pleading or other  
 11 document he submits for consideration by the Court. Plaintiff must include with the  
 12 original paper to be filed with the Clerk of the Court a certificate stating the manner in  
 13 which a true and correct copy of that document was served on Defendants, or counsel for  
 14 Defendants, and the date of that service. Any paper received by the Court which has not  
 15 been properly filed with the Clerk or which fails to include a Certificate of Service may  
 16 be disregarded.

17  
 18 DATED: January 16, 2015

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20 **HONORABLE LARRY ALAN BURNS**  
 21 United States District Judge

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 26 the Doe Defendants at this time because where the identity of an alleged party is not  
 27 known prior to filing of an action, Ninth Circuit authority permits plaintiff the  
 28 opportunity to pursue appropriate discovery to identify the unknown Does, unless it is  
 clear that discovery would not uncover their identities, or that his Complaint should be  
 dismissed for other reasons. *See Wakefield v. Thompson*, 177 F.3d 1160, 1163 (9th Cir.  
 1999) (citing *Gillespie*, 629 F.2d at 642).